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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. _____

JAPAN LINE, LTD., Petitioner,

v.

JAMES TURNER and PHILIPPINE PRESIDENT LINES, INC., MANILA, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Japan Line, Ltd., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 27, 1981, in *Turner v. Japan Line, Ltd.*, (9th Cir. 1981) 651 F.2d 1300. Docket Nos. 79-4060, 79-4062, 79-4182; CV. 75-727 ORS.

QUESTIONS PRESENTED FOR REVIEW

(A) Has the Ninth Circuit restored the doctrine of unseaworthiness in long-

shoremen's injury cases contra to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) (LHWCA) and the Supreme Court's interpretation of "negligence" of a vessel under 33 U.S.C. § 905(b), *i.e.* no liability absent a showing of fault? *Scindia Steam Navigation Co. v. De Los Santos*, ___ U.S. ___, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981).

(B) Is a "vessel" strictly liable for the breach of duty of a foreign stevedore? *Turner v. Japan Line, Ltd.*, (9th Cir. 1981) 651 F.2d 1300. Or is a "vessel" liable for the breach of duty of a foreign stevedore only on a showing of fault? *Ruffino v. Scindia Steam Navigation Co.*, (2d Cir. 1977) 559 F.2d 861 ("knowledge" and "opportunity to correct"); *Lemon v. Bank Lines, Ltd.*, (5th Cir. 1981) 656 F.2d 110 ("actual knowledge" and "failed to take actions"). Does the liability of a "vessel" for a breach of duty for a foreign stevedore

depend on whether the breach results in injury to a longshoreman in Longview, Washington (*Turner v. Japan Line, supra*), Savannah, Georgia (*Lemon v. Bank Lines, Ltd., supra*) or Brooklyn, New York (*Ruffino v. Scindia Steam Navigation Co., Ltd.*)?

(C) May the federal court assume jurisdiction sua sponte on the issue of indemnity in the face of a clause requiring arbitration of all claims arising between the parties under a charter party agreement?

(D) Has the Ninth Circuit departed from the accepted and usual course of proceedings in awarding Philippine President Lines $955,000 in indemnity against Japan Line (a matter not at issue on appeal) and not reaching the issue on the cross appeals of Japan Line and Philippine President Lines (the excessive award of damages to Mr. Turner)?

(E) Has the Ninth Circuit violated provisions of a Japanese-American treaty by abrogating Japan Line's rights to arbitration under the charter party?

(F) Has the Ninth Circuit violated the most favored nation treatment guaranteed under treaty to Japanese companies in imposing burdens on Japan Line not imposed by the federal courts on companies by other nations?

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OPINION BELOW

The appendix contains the opinion of the Court of Appeals which was reported at 651 F.2d 1300 (9th Cir. 1981) (App-1), that judgment (App-20), and the order denying the motion for rehearing of Japan Line, Ltd. (App-21). The opinion of the Magistrate of District Court for the District of Oregon is at App-16.

JURISDICTION

The judgment of the Ninth Circuit was entered July 27, 1981 (App-1). Japan Line, Ltd. timely filed a petition for rehearing on August 24, 1981. The order of the Ninth Circuit denying that petition was entered May 24, 1982 (App-21). Pursuant to the motion of Japan Line, Ltd., the Ninth Circuit entered an order on May 24, 1982 staying mandate for thirty days to allow Japan Line, Ltd., to petition for certiorari (App-22). This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Two federal statutes are involved. The opinion interprets that duty which is the corollary of that "negligence" for which a "vessel" can be liable under 33 U.S.C. § 905(b) (LHWCA) (App-24). The opinion vitiates the rights of the owner and time charterers to arbitration guaranteed by the United States Arbitration Act, 9 U.S.C. § 1, *et seq.* (1976) (App-26).

The rights of Japan Line to have this issue submitted to arbitration are guaranteed by the treaty of Friendship, Commerce and Navigation signed April 2, 1953, between the United States and Japan. T.I.A.S. 2863: U.S.T. 4.2.2063 (App-27). This same treaty guarantees Japanese companies most favored nation treatment.

STATEMENT OF THE CASE

Federal jurisdiction was originally invoked pursuant to 28 U.S.C. § 1332.

On June 13, 1974, plywood stowed in the hold of the PRESIDENT QUEZON fell on James Turner, a longshoreman employed to off-load the cargo at Longview, Washington (R. 77-78, Tr. 104-105). Philippine President Lines, Inc. owns the ship, which it had leased under a time charter to Japan Line (Ex. 2). An independent Japanese stevedore had loaded the plywood in Japan (R. 210-211). A Japanese surveyor licensed by the Japanese government inspected and approved the loading operation (R. 218). Japan Line personnel were not aboard the vessel and did not participate in the cargo loading operation (R. 217-218). The owner's crew manned the vessel (Ex. 2).

Mr. Turner sued Japan Line and Philippine President Lines for "negligence" under 33 U.S.C. § 905(b) (R. 78). Mr. Turner did not contend that the master or crew had knowledge of the defective storage (R. 78). There was no contention

that Japan Line personnel were on board during the loading of cargo in Japan. Two witnesses for Mr. Turner prescribed the duty of the "vessel" to Mr. Turner in terms of the strict liability doctrine of unseaworthiness (R. 149-150, 166). The trial judge knew that Congress had repealed this duty (App-17). The testimony appears in the opinion of the Ninth Circuit as a rebirth of the doctrine of unseaworthiness (App-9). 651 F.2d at 1304.

The trial judge granted the request of counsel for the owner that an instruction be given that Clause 8 of the charter party defined the agency of the master in the cargo loading operations (R. 346-347, 302). Counsel for Japan Line objected, urging that the clause defined liability for cargo damage, not personal injury (R. 240-241, 311). The jury did not make any allocation between the two defendants (R. 413). It

returned a verdict in excess of $950,000 against both defendants (R. 413).

The trial judge entered a judgment N.O.V. holding that the defendants owed no duty under 33 U.S.C. § 905(b) to Mr. Turner for the operations of the foreign stevedore. Moreover, the trial judge held that there was no evidence from which the jury could have found that the master or crew should have known of the defective stowage by the Japanese stevedore (R. 530-532).

Mr. Turner appealed the judgment N.O.V. Japan Line cross appealed on the denial of its motion for a new trial on the issue of damages (R. 554-555). Philippine President Lines also cross appealed on the issue of remittur and on the issue of the denial of its motion for new trial (R. 546-547).

The Ninth Circuit did not reach either issue raised on cross appeal. The Ninth Circuit reversed the trial judge on the 33

U.S.C. § 905(b) duty. The Ninth Circuit fashioned an unprecedented duty for the "vessel" from the testimony of Mr. Turner's witnesses who "testified that the master's primary duty is to protect the seaworthiness of the vessel and the safety of the crew and passengers" (App-3-App-4). 651 F.2d at 1302. The court held that a "vessel" in the person of the master has a 33 U.S.C. § 905(b) duty to supervise the work of a foreign stevedore (App-8-App-9). 651 F.2d at 1304.

The Ninth Circuit then reached an issue not tried below and not raised on appeal, allocation of liability between the vessel's owner, Philippine President Lines, and the time charterer (App-12). 651 F.2d at 1305. The charter party reserved this issue to arbitration (Ex. 2, para. 17). The Ninth Circuit referred to one paragraph in the charter party, Clause 8, and a case applying the LHWCA prior to its 1972 amend-

ments and held that the charterer must indemnify the owner (App-13). 651 F.2d at 1305-1306. There was no contention in the pretrial order that Clause 8 allocated liability between the owner and the charterer.

Japan Line petitioned for rehearing on August 24, 1981. On May 24, 1982, that petition was denied (App-21).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Imposes Liability Without Fault (Restoring the Doctrine of Unseaworthiness) upon a Vessel in Violation of 33 U.S.C. § 905(b) and is Directly Contrary to *Scindia Steam Navigation Co. v. De Los Santos*, ___ U.S. ___, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981).

The Ninth Circuit has decided an important question of federal law in a way

in conflict with the applicable decision of this court and the federal statute itself. Supreme Court Rule 17.1(c).

The Ninth Circuit recalled the strict liability doctrine of "unseaworthiness" from its Congressionally prescribed grave by its very name:

> "The experts (provided by Mr. Turner) testified that the master's primary duty is to protect the seaworthiness of the vessel and the safety of the crew and passengers." 651 F.2d at 1302; App-3.

The experts testified that this duty is nondelegable (R. 149-150, 166). The Ninth Circuit created from this wispy talk of seaworthiness a duty of a "vessel" for supervision of the cargo operations of a foreign stevedore. The vessel cannot delegate this new duty:

> ". . . The negligence of the vessel is premised on failure of the master to exercise reasonable care in supervision of the work of the Japanese stevedore." 651 F.2d at 1304; App-8.

Mr. Turner did not plead any such duty (R. 395). Congress expressly spiked such a duty in the 1972 amendments to the LHWCA. Under these amendments, the vessel can delegate responsibility for cargo operations to the stevedore:

> ". . . If such person was employed by the vessel to provide stevedoring services no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." 33 U.S.C. § 905(b)

The Ninth Circuit allows the vessel to delegate the duty to *American* stevedores. Unless the personnel of the vessel are involved in the stevedoring operations ("operational control"), the vessel is immune from suit from longshoremen injured because of the negligence of the stevedore. In *Davison v. Pacific Inland Navigation Co., Inc.*, 569 F.2d 507 (9th Cir. 1978), the Ninth Circuit reversed a judgment against the time-charterer because the evidence showed that it had no knowledge or

control of the operations of the American stevedore. As the Ninth Circuit noted:

> "To hold . . . (the time-charterer) liable in this case would be a return to the strict liability unseaworthiness doctrine which Congress has eliminated . . . ." 569 F.2d at 514

Same: Shanahan v. A/S Atlantica & Tinfos Papirfabrik, 471 F.2d 369 (9th Cir. 1973), *cert. denied* 412 U.S. 906, 93 S.Ct. 2293, 36 L.Ed.2d 971 (1973).

The duty is non-delegable because there is no evidence of "operational control." The crew was not involved in the stevedore operations. It was physically impossible for the master or mate to observe the stowage in that part of the hold where Mr. Turner was hurt (R. 171). The only notice the vessel had on the stowage of the cargo is the warrant from the surveyor licensed by the Japanese government warranting that the stowage was proper (R. 210-211, 394). A different liability of the vessel for foreign stevedores is

contrary to this court's interpretation of 33 U.S.C. § 905(b). *Scindia Steam Navigation Co. v. De Los Santos, supra.* In sum, on the point of the duty of the vessel to supervise the operations of the stevedore this court held:

> ". . . The shipowner's duty of reasonable care under the circumstances does not impose a continuing duty to inspect the cargo operations once the stevedore begins its work." 101 S.Ct. at 1620, fn. 10.

Scindia came to this court from the Ninth Circuit. The Ninth Circuit has reverted to the same standard which this court struck in the *Scindia* case. When *Scindia* was before the Ninth Circuit, it held that the vessel is liable for injury to longshoremen caused by conditions which the vessel:

> "(a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such longshoremen, and

> "(b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger." *Santos v. Scindia Steam Navigation Co.*, 598 F.2d 480 (9th Cir. 1979)

The phrasing of that is more succinct in the *Turner* case:

> "We hold, therefore, that the vessel had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of." 651 F.2d at 1304

The Ninth Circuit is consistent in its error.

2. The Decision Below is in Direct Conflict with the Decisions of Two Other Maritime Circuits on the Interpretation of 33 U.S.C. § 905(b).

This decision is in conflict with the decisions of the Fifth and Second Circuits on the same matter. Supreme Court Rule 17.1(a).

The Ninth Circuit has held that the "vessel" has a nondelegable duty to super-

vise the cargo operations of foreign stevedores. 651 F.2d at 1304; App-8. The Ninth Circuit noted that this holding is in conflict with the Second Circuit:

> "To the extent that this holding is inconsistent with the result reached in *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977), we must, for the reasons given above, disagree with the Second Circuit." 651 F.2d at 1304, n. 2; App-10.

Cargo loaded in Calcutta, India, by independent stevedores fell on a longshoreman during unloading operations at Brooklyn, New York. 559 F.2d at 862. The conditions of stowage in the foreign port were exactly as in our case: independent foreign stevedore, no supervision by the vessel, stowage in an area not visible to the crew from above. The Second Circuit acknowledged Congressional intent in amending 33 U.S.C. § 901 *et seq.*:

> "In enacting the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, Congress intended to relieve shipowners of

> liability predicated upon the negligence of stevedoring companies. *Napoli v. Hellenic Lines, Inc.*, 536 F.2d 505, 507 (2d Cir. 1976). After the amendment, Congress said, the vessel would be liable only for its own failure to use reasonable care, *Munoz v. Flota Merchante Grancolombiana, S. A.*, 553 F.2d 837, 840 (2d Cir. 1977) which would be determined in accordance with land-based principles of negligence. *Napoli, supra* at 507." 559 F.2d at 862

The court noted that the issue is the liability of the vessel for the acts of an independent contractor:

> "Before liability can attach for such independently created danger, the owner must have knowledge of its existence and an opportunity to alleviate it.
>
> ". . . . .
>
> "Application of these land-based principles to the claims of longshoremen means that a shipowner cannot be held liable for a dangerous condition created by an independent stevedore unless he has actual or constructive knowledge that the condition exists." 559 F.2d at 862

The court then turned to the facts of the case before it, which were, to repeat,

identical to ours. The court found no liability:

> "We have here a condition which was allegedly defective but was concededly latent, *i. e.*, located in the in-shore wing of the upper tween deck and hidden from view by layers of carpets. The ship-owner was not required to super-vise the minute details of the loading stevedore's work." 559 F.2d at 863

The Fifth Circuit adopted the same rule on the same facts in *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981). Mr. Lemon was injured while unloading rolls of burlap and bales of jute. He fell through a wooden cargo divider which could not hold his weight. 656 F.2d at 112.

The Fifth Circuit discussed *Scindia* and noted that the vessel has no duty to supervise cargo operations:

> "It is the stevedore who must see to the safety of cargo opera-tions." 656 F.2d at 115

This vessel, however, was liable for the negligent loading by the stevedore because of:

> ". . . the fact that the chief mate had actual knowledge of the improper loading technique and failed to take actions to either correct the stowage or warn the plaintiff or his co-workers of the dangerous conditions contained within the stow." 656 F.2d at 116

There is no evidence of actual knowledge in the *Turner* case.

3. The Court Below Departed from the Accepted and Usual Course of Proceedings in Ruling on a Matter Not in Issue (Indemnity) and Not Reaching the Issue on Cross Appeal (the Excessive Award of Damages).

The Ninth Circuit departed from the accepted and usual course of proceedings in ruling on a matter not in issue (indemnity) and not reaching the issue on cross appeal (the excessive award of damages). This departure calls for an exercise of this court's power of supervision. Supreme Court Rule 17.1(a). In ruling on the merits of indemnity, an issue reserved to

arbitration under the terms of the charter party, the Ninth Circuit vitiated the rights of the parties to arbitration guaranteed by the United States Arbitration Act, 9 U.S.C. § 1, *et seq.* (1976). Supreme Court Rule 17.1(a) and (c).

The opinion correctly states the procedural posture on appeal:

> "These are appeals and cross-appeals from a judgment n. o. v. for defendants Japan Lines and Philippine President Lines, following a jury trial in which plaintiff-appellant Turner received a verdict for $955,976.11. Turner appeals from the grant of judgment n. o. v.; Japan Lines and Philippine President Lines cross-appeal to attach the jury verdict, if it should be reinstated." 651 F.2d at 1301; App-1.

Although the opinion disposed of an issue not in the case, indemnity, the court did not reach the issue raised on cross appeal by defendants: the excessive award of damages.

The Ninth Circuit held that Japan Line must indemnify Philippine President Lines for the full jury verdict:

> "The issue before us is whether Clause 8 of the charter party entered into by the defendants places the responsibility for injuries to longshoremen caused by the negligent supervision of cargo operations on the Owner or on the Time-Charterer." 651 F.2d at 1306; App-14.

The issue was not before the Ninth Circuit. The court's own statement of the procedural posture shows that the issue was not before the court.

The owner, Philippine President Lines, Inc., Manila, did not seek or *even allege* that it was entitled to indemnity from Japan Line, Ltd., the time-charterer (R. 397). There was no evidence at trial on this issue.

Under the charter party, Japan Line and Philippine President Lines agreed to submit disputes between the two of them to commercial men in New York:

> "(17) That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men." (Ex. 2)

The wisdom of the arbitration provision is painfully demonstrated by the inept interpretation of the charter party by the Ninth Circuit. The court based its interpretation of Clause 8 solely on *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145 (2d Cir. 1976). That case was decided prior to the 1972 amendments to the LHWCA and is the quintescence of the indemnity cycle which Congress sought to break. It is true that the time-charterer was required to indemnify the owner in that case. But, the loss fell on the two parties actually negligent, the stevedore and the shipper who had to indemnify the time-charterer. *Fernandez v.*

Chios Shipping Co., Ltd., supra, is an example of the grotesque reasoning which grew in the fictions of the doctrine of seaworthiness. The interpretation of Clause 8 in that case is singular among the cicuits. *See D/S Ove Skou v. Herbert*, 365 F.2d 341 (5th Cir. 1966), *cert. denied*, 400 U.S. 902, 91 S.Ct. 139, 27 L.Ed.2d 139 (1970), *Migut v. Hyman-Michaels Co.*, 571 F.2d 352, 354 (6th Cir. 1978).

Moreover, the liabilities of the two signatories are defined by the *entire* charter party. The court did not have the benefit of any briefing on the charter party as no party knew that the issue was before the court.

4. The Court Below Assumed Jurisdiction Sua Sponte of the Issue of the Respective Liability of the Defendants in Violation of the Arbitration Clause of

Charter Party, the Federal Arbitration Act, and Case Law of this Court.

Had the issue of indemnity been raised prior to the Ninth Circuit's opinion, Japan Line would have stayed judicial proceedings and gone into arbitration under Clause 17 of the charter party. This access to arbitration is a right guaranteed to Japan Line by the federal Arbitration Act (App-26) 9 U.S.C. § 1 *et seq.*

The language of the statute is mandatory. This court has interpreted this section to require that the judicial action be stayed:

> "Section 3 requires a federal court in which suit has been brought 'upon any issue referrable to arbitration under an arbitration in writing for such arbitration' to stay the court action pending arbitration once it is satisfied that the issue is arbitrable under the agreement." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400, 87 S.Ct. 1801, 1804 (1967)

This court has held that federal courts may not rule on the merits of a claim for indemnity in the face of a clause requiring arbitration of all claims arising between the parties. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343 (1960).

Clause 17 of this charter party is inclusive of all disputes between the parties. Under the *United Steelworkers v. American Mfg. Co.* rule, a court's review on the merits is limited merely to ascertaining whether the party seeking arbitration is making a claim which, on its face, is governed by the contract. It was error for the Ninth Circuit to order indemnity without allowing Japan Line the opportunity to exercise its right to an arbitration hearing.

5. The Ninth Circuit Has Abrogated Japan Line's Right to Arbitration Guaranteed by Treaty.

The abrogation of Japan Line's right to arbitration violates the treaty of Friendship, Commerce and Navigation signed April 2, 1953 between Japan and the United States. T.I.A.S. 2863: U.S.T. 4.2.2063. Article IV(2) of that treaty declares arbitration awards are to be enforced in the courts of either signatory and shall not be abridged unless contrary to public policy (App-26). The Ninth Circuit has exceeded its jurisdiction in abridging rights guaranteed to a Japanese company under this treaty.

6. The Ninth Circuit Has Violated the Most Favored Nation Treatment Guaranteed Under Treaty to Japanese Companies in Imposing Burdens on Japan

Line Not Imposed by the Federal Courts on Companies of Other Nations.

Article XIX(3) of the Treaty of Friendship, Commerce, and Navigation guarantees the vessels of Japanese companies "national treatment and most-favored-nation treatment within the ports, places and waters" of the United States (App-28). "Most-favored-nation treatment" as defined in Article XXII(2) must be:

> "No less favorable than the treatment accorded (in the United States) in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country." App-29.

"National treatment" requires like treatment for Japanese nationals and Japanese companies as that accorded America nationals and American companies.

The vessel of Japan Line has received less favorable treatment than the vessels of all other nations "in like situations." The Ninth Circuit imposed a nondelegable

duty on Japan Line to supervise stevedores in foreign ports. Most-favored-nation treatment and national treatment requires that the judgment N.O.V. in favor of Japan Line be affirmed under the principles of *Ruffino v. Sandia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977) and *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981). In both cases, on facts identical to the *Turner* case, the vessels were held to have no duty to supervise a foreign stevedore.

The Ninth Circuit held that the ship's master was an agent of Japan Line under Clause 8 of the New York Produce Exchange charter party (App-13-App-14). 615 F.2d 1305-1306. "In like situations" federal courts have held that Clause 8 of this charter party does not make the master of the ship an agent of the time charterer. *D/S Ove Skou v. Hebert, supra*, 365 F.2d at 351; *Migut v. Hyman-Michaels Co., supra*,

571 F.2d at 354; *Mondella v. S.S. Elie V*, 223 F. Supp. 390, 392 (S.D. N.Y. 1963); *Wyche v. Oldendorff*, 284 F. Supp. 575, 576 (E.D. Va. 1967). The nationals who chartered these vessels were not liable under Clause 8 for the acts of the master. The treaty requires like treatment for Japan Line.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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June 21, 1982

APPENDIX A

OPINION OF THE NINTH CIRCUIT

James TURNER, Plaintiff-Appellant and Cross-Appellee,

v.

JAPAN LINES [sic], LTD., and Philippine President Lines, Inc., Manila, Defendants-Appellees and Cross-Appellants.

Nos. 79-4060, 79-4062 and 79-4182.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 11, 1980.

Decided July 27, 1981.

Appeal from the United States District Court Judges, and GRANT, District Judge.*

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*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

FLETCHER, Circuit Judge:

These are appeals and cross-appeals from a judgment n. o. v. for defendants Japan Lines [sic] and Philippine President Lines, following a jury trial in which plaintiff-appellant Turner received a verdict for $955,976.11. Turner appeals from the grant of judgment n. o. v.; Japan Lines [sic] and Philippine President Lines cross-appeal to attack the jury verdict, if it should be reinstated.

I.

FACTS

Turner was a longshoreman in Longview, Washington. On June 13, 1974, he was unloading plywood from the PRESIDENT QUEZON when a stack of plywood in the hold collapsed beneath him. Turner incurred serious injuries, and as a result now suffers from an apparently untreatable form of epilepsy.

The vessel PRESIDENT QUEZON is owned by Philippine President Lines (Owner). At the time of Turner's accident, the vessel was time-chartered to Japan Lines [sic], Ltd. (Time-Charterer) under the New York Produce Exchange charter party. The cargo of plywood was loaded on the PRESIDENT QUEZON in Kushiro, Japan by Mitsuwa Transport Co., a stevedore, pursuant to a contract with the Time-Charterer. Another Japanese firm was engaged to shore and lash the cargo, and the completed stow was inspected by a licensed Japanese marine surveyor.

At trial, Turner produced evidence to show how stacks of plywood should be stowed in the hold of a ship and how the plywood on which he was injured was improperly stowed. According to the testimony, the hull of the vessel curves outward and upward from the deck of the lower hold. This concave curvature is called the "sheer" of the ship. When bundles of plywood are stowed against the sheer, the first stack of bundles (three or four feet thick) is butted against the sweat battens, which protect the cargo from contact with the bare hull. Dunnage (lengths of scrap lumber) is placed on top of the stack to separate it from the stack above, so that

when the cargo is unloaded, the forks of lift trucks can be fitted between them. The next stack of plywood is placed atop the dunnage and butted against the sheer. This stack rests only partially on the first stack; part of it is unsupported from below because of the outward curve of the sheer. In order to prevent the stack from tipping under the weight of workers or of the stacks on top of it, it must be "shored" from below. The shoring consists of vertical lengths of lumber nailed upright between the dunnage timbers and the sweat battens of the hull. The shoring, or lack of it, is invisible to the offloading longshoreman until the plywood it supports is removed.

The evidence showed that no nails were found in the pile of lumber under the collapsed plywood after the accident. Expert testimony indicated that it should be inferred from this that the shoring had not been constructed properly. There was also evidence that a properly shored stack of plywood should not have collapsed under the weight of a longshoreman.

Witnesses testified that many hours of work by marine carpenters would have been required to build proper shoring. The vessel's log indicates the time at which the marine carpenters who constructed the shoring entered the hold. This, according to plaintiff, indicates that the master or one of the mates was aware that the shoring work had begun, and it had ample opportunity to monitor it.

Plaintiff also called expert witnesses who testified as to the duties of the master of the ship in overseeing the stow of the cargo. The experts testified that the master's primary duty is to protect the

seaworthiness of the vessel and the safety of the crew and passengers. The master is also responsible for the safety of the cargo and those who unload it. The master or one of his mates is always on watch on the vessel. The experts also testified that the master or one of his mates is responsible for overseeing the loading operations and particularly for ensuring that the cargo is properly shored.

The evidence showed that Turner was injured when he was standing atop three stacks of plywood, nine to twelve feet above the deck of the hold. He was in the process of rigging the ship's hoisting gear to the top stack of plywood when the stack tipped beneath him. The falling stack knocked the stacks underneath it away from the sheer of the hull, and the entire stack collapsed. Turner was struck on the head.

This testimony was uncontradicted by defendants, who submitted only documentary evidence. The magistrate instructed the jury that the Owner or the Time-Charterer or both would be liable to the plaintiff if the master of the vessel knew or in the exercise of reasonable care should have known of the defective stow and of the danger it posed. The magistrate also submitted to the jury the question whether, if the master of the vessel was found to have been negligent, he was acting for the Owner or the Time-Charterer or both. The jury returned its verdict for plaintiff against both defendants.

After the jury returned its verdict, the magistrate granted judgment n. o. v. to the defendants on the authority of *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977). It is unclear from the order granting judgment whether the magis-

trate considered the evidence insufficient to go to the jury on the question of negligence, or whether he concluded that defendants had no duty to plaintiff as a matter of law.

The questions presented for our review are:

(1) whether the defendant(s) owed any duty to the plaintiff under the circumstances of this case;

(2) if so, whether the evidence was sufficient to support the jury's verdict;

(3) if so, whether under the charter party, the Owner or the Time-Charterer or both are liable to plaintiff for his injuries.

II

NEGLIGENCE

A. *Vessel's Duty to Longshoremen*

This case arises under § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b) (1976). That section, as amended in 1972, gives an injured longshoreman a cause of action against a "vessel" for its negligence. "Vessel" is defined to include the vessel's "owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member." 33 U.S.C. § 902(21). However, since the 1972 amendments the longshoreman no longer has an action against the vessel for unseaworthiness, a type of liability without fault. *Compare Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90

L.Ed. 1099 (1946), *with Scindia Steam Navigation Co. v. de los Santos*, ___ U.S. ___, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981).[1]

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[1]Considerable controversy has arisen over what constitutes "negligence" as opposed to "unseaworthiness." Some commentators have suggested that the difference between the two causes of action is slight, since most unseaworthy conditions are the result of someone's negligence. See e. g., G. Gilmore & C. Black, The Law of Admiralty 452-55 (2d ed. 1975). The two situations in which an injured longshoreman can no longer recover from the vessel would seem to be (1) where the injury is the result of a condition of which the vessel has no notice or opportunity to correct, and (2) where the injury is caused entirely by the negligence of a third party, e. g., the longshoreman's stevedore-employer. Id. at 452. This interpretation comports well with the purposes of the 1972 amendments. See H.R.Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Ad.News 4698, 4699, 4703-05.

The Supreme Court has recently held that negligence under § 905(b) is to be measured by the general maritime standard of reasonable care under the circumstances and that

> [t]his duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known

> to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Scindia Steam Navigation Co. v. de los Santos, 101 S.Ct. at 1621. *Scindia* involved a longshoreman who was injured by an allegedly defective winch during offloading operations. The shipowner there contended that it had no duty to repair the ship's equipment once the stevedore had commenced work. The Court rejected this contention, holding that if the shipowner was or should have been aware of the winch's condition and of the unreasonable risk of harm to the longshoreman, and if it were clear that the stevedore would not or could not remedy the problem, the shipowner would have a duty to intervene. *Id.*

The defendants here argue that neither the Owner nor the Time-Charterer had any duty to supervise the activities of the loading stevedore, so that neither can be held liable to an offloading longshoreman for injuries which result from the loading stevedore's negligence. We have found one decision apparently adopting this view. *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977).

There are, to be sure, other cases in which courts have rejected attempts by longshoremen to recover from a vessel for failure to supervise the work of the stevedore. With the exception of *Ruffino*, however, those cases involve injuries incurred during stevedoring operations and allegedly caused by the injured *employee's* stevedore-

employer's negligence. In this context, the Supreme Court in *Scindia* and the circuits in numerous cases have reviewed the reasons why, under the amended Act, it would be undesirable to impose liability on the shipowner for failing to supervise minutely the stevedore-employer's operations. *See, e. g., Scindia Steam Navigation Co. v. de los Santos*, ___ U.S. ___, 101 S.Ct. 1614, 1622-24, 68 L.Ed.2d 1 (1981); *Munoz v. Flota Merchante Grancolombiana, S. A.*, 553 F.2d 837, 840-41 (2d Cir. 1977). The shipowner, after the 1972 amendments, no longer has a right over against the stevedore-employer for its concurrent negligence. 33 U.S.C. § 905(b); *Scindia Steam Navigation Co. v. de los Santos*, 101 S.Ct. at 1624; *Munoz v. Flota Merchante Grancolombiana, S. A.*, 553 F.2d at 841. However, if the longshoreman recovers from the vessel in a negligence action, the stevedore-employer can then recover from the longshoreman the value of the compensation payments made to him. 38 U.S.C. § 933. Thus, the stevedore-employer would be effectively relieved of any liability, even if it were primarily at fault. This result would remove any incentive to the stevedore to improve the safety of its operations, thus vitiating one of Congress' goals in enacting the amendments. *Scindia Steam Navigation Co. v. de los Santos*, 101 S.Ct. at 1629 (Powell, J., concurring); *Munoz v. Flota Merchante Grancolombiana, S. A.*, 553 F.2d at 841.

This concern may be justified, but it has no relevance to the case before us. The third party that is primarily negligent is not the plaintiff's employer, but rather the Japanese stevedore (the negligence of the vessel is premised on failure of the master to exercise reasonable care in supervision of the work of the Japanese

stevedore). Section 905(b) does not bar the shipowner from recovering against the foreign stevedore, only from recovering against the "employer" as defined in the Act. 33 U.S.C. § 902(4). Second, the fact that the plaintiff's stevedore-employer will be able to recover the compensation payments it has made does not in any way diminish its incentive to maintain safe operations. The posited negligence here is that of the foreign stevedore; the parties agree that the stevedore-employer could not have prevented this accident by any exercise of care.

[1] To the contrary, imposing a duty on the Owner or Time-Charterer or both in this case should further the congressional goal of safety. The foreign stevedore, who is presumably primarily at fault, may in many cases be beyond reach of the court's processes, and the injured longshoreman would be unable to sue it. As between the vessel and the stevedore-employer, the vessel is the only one in a position to ensure the safety of the longshoremen. The offloading stevedore has no control whatsoever over the foreign stevedore. The vessel, on the other hand, can ensure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore. We do not believe that Congress, in enacting a careful scheme of compensation and liability, could have meant to leave the longshoreman to the mercies of foreign stevedores against which he may have no rights or, at least, no practical remedy. We hold, therefore, that the vessel had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could,

in the exercise of reasonable care, have corrected or warned of.[2]

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[2]To the extent that this holding is inconsistent with the result reached in Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977), we must, for the reasons given above, disagree with the Second Circuit.

B. Sufficiency of the Evidence

[2] The next question we must consider is whether the plaintiff presented sufficient evidence from which the jury could have concluded that the vessel knew or should have known of the lack of shoring in the hold, and of the resulting danger. We think that sufficient evidence was presented.

This court will not disturb a jury's verdict "unless we find that the evidence was insufficient as a matter of law to support [the] verdict -- that the evidence was such that no reasonable man would accept it as adequate to establish the existence of each fact essential to liability." *Kunz v. Utah Power & Light Co.*, 526 F.2d 500, 504 (9th Cir. 1975). *See also California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 734 (9th Cir. 1979).

As noted above, the plaintiff presented experts who testified as to the custom in the industry with respect to the master's, and hence the vessel's, responsibility. Defendants argue that this testimony was irrelevant and entitled to no weight at all, because the experts spoke in terms of the master's duty to ensure the "seaworthiness" of the vessel, a concept

supposedly irrelevant under § 905(b). This argument, however, misses the point. The experts testified not about legal conclusions ("unseaworthiness" or "negligence") but about custom in the industry with respect to the master's duties. Furthermore, the master *is* responsible for the seaworthiness of the vessel; he is simply not liable without fault to injured longshoremen. *See, e. g., Nichimen Co. v. M. V. Farland*, 462 F.2d 319, 331-32 (2d Cir. 1972). Since the jury was quite properly not instructed in terms of strict liability for unseaworthiness, there is no possibility that it might have confused the two related meanings of the term.

The Supreme court in *Scindia* observed that a "necessary inquiry is whether the pertinent statutes, regulations, *or custom* place or assume a continuing duty on the vessel." 101 S.Ct. at 1626 (emphasis added). We believe that the expert testimony offered by plaintiff was relevant, and perhaps necessary, to establish the customary scope of the master's duties.

In addition to this expert testimony, plaintiff offered the testimony of longshoremen as to how the cargo should have been shored and how long the shoring should have taken; entries into the ship's log noting when the marine carpenter entered the hold; and testimony that the master or his mates were responsible for continuous

supervision of the loading operations, particularly the shoring of the cargo.[3]

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[3]The plaintiff also argues that he is entitled to the benefit of an inference against defendants because they failed to produce the testimony of Captain Pucan, the master of the vessel. Defendants had apparently notified plaintiff of their intent to produce Captain Pucan, and in fact he was present at the trial. Defendants put on no evidence at trial and neither plaintiff nor defendants called Captain Pucan. We need not address this argument because we hold that the plaintiff's evidence was sufficient to support the verdict without this inference.

Plaintiff also produced evidence that the stow of the cargo was unreasonably dangerous to the offloading longshoremen, and that the defect could have have been discovered by them.

We hold that the evidence taken together was sufficient to support the jury's verdict for plaintiff, and that the magistrate erred in giving judgment n. o. v. to defendants.

III

INDEMNITY

Having decided that the "vessel" negligently caused plaintiff's injuries, we must determine whether the liability falls on the Owner, the Time-Charterer, or both. The magistrate asked the jury to decide

whether, under Clause 8 of the charter party,[4] the master was acting for the Owner

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[4]Clause 8 of the charter party provides:

> That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customer assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow and trim and discharge the cargo at their expense and risk under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

or the Time-Charterer when he failed properly to supervise the cargo operations. The jury responded by holding both defendants liable.

We think that the trial court misperceived the question, and that it was error to ask the jury to interpret the contract. First, the contract was not relevant to the *duty* owed by either defendant to the plaintiff. *Cf. Scindia Steam Navigation Co. v. de los Santos*, 101 S.Ct. at 1626 (contract between vessel and stevedore relevant to vessel's responsibility for safety of stevedore's employees). The question was put to the jury, and the jury decided, that the *vessel* was negligent in either its supervision of the load operation or its failure to warn plaintiff of a dangerous condition, or both. The vessel discharged its duties through the master, who was an agent of both the Owner and the Time-Charterer under the charter party. Thus,

inasmuch as the jury decided that the loading operations were negligently supervised, it was correct to hold both the Owner and the Time-Charterer liable. It was not up to plaintiff to prove, as between the defendants, which party had contracted to bear the responsibility for loading and unloading operations.

Second, the interpretation of the contract in this context was a question of law and should have been decided by the court. *See, e. g., Migut v. Hyman-Michaels Co.*, 571 F.2d 352 (6th Cir. 1978); *Fernandez v. Chios Shipping Co.*, 542 F.2d 145, 151-53 (2d Cir. 1976). Since the trial court has not considered the question, this court is entitled to do so in the first instance. *See East Oakland-Fruitvale Planning Council v. Rumsfeld*, 471 F.2d 524, 529 (9th Cir. 1972).

[3] The issue before us is whether Clause 8 of the charter party entered into by the defendants places the responsibility for injuries to longshoremen caused by the negligent supervision of cargo operations on the Owner or on the Time-Charterer. The charter party in question, the New York Produce Exchange form, is widely used and has been construed frequently by the courts. *See, e. g., Fernandez v. Chios Shipping Co.*, 542 F.2d 145 (2d Cir. 1976); *Nichimen Co. v. M. V. Farland*, 462 F.2d 319, 330-34 (2d Cir. 1972). *See generally* G. Gilmore & C. Black, *The Law of Admiralty* 229-39, 1003-10 (2d ed. 1975); M. Wilford, T. Coghlin, & N. Healy, *Time Charters* 137-42 (1978). The Second Circuit in *Fernandez* faced the identical issue. It held that Clause 8 of the charter party, which makes the time-charterer responsible for the "load, stow, trim and discharge" of the cargo, see note 4 *supra*, also makes the

time-charterer primarily liable for any injury to cargo or longshoremen which results from the improper performance of those operations. *Id.* at 151-53.

We agree with the decision of the Second Circuit.[5] Because plaintiff's

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[5]Defendant Time-Charterer argues that the Fifth Circuit reached a contrary conclusion in D/S Ove Skou v. Hebert, 365 F.2d 341, 351-52 (1966). That case was decided prior to the 1972 amendments to the LHWCA. The court denied the owner indemnity from the time-charterer for damages owed to an injured longshoreman, under Clause 8 of the charter party. See id. at 344 n. 5. The court held that the time-charterer made no warranties to the owner that the stevedores hired by the time-charterer would perform in a workmanlike manner. The jury had found that the owner negligently maintained its ship in a defective condition, and that the stevedore negligently failed to discover the condition and correct it. In contrast, in the case at bar the negligence found by the jury occurred in the course of precisely those operations for which the time-charterer had assumed contractual responsibility. The defect was not one in the ship's equipment, as it was in Hebert. Had it been, we would certainly reach a different result, since the Owner expressly warranted in the charter party that it would maintain the ship in a seaworthy condition.

injury was caused by improper loading of the cargo, we hold that the Time-Charterer must indemnify the Owner for any damages paid to plaintiff.

REVERSED and REMANDED for proceedings consistent with this opinion.

APPENDIX B

OPINION OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAMES TURNER,	)	
	)	
Plaintiff,	)	Civil No. 75-727
	)	
v.	)	ORDER
	)	
JAPAN LINES [sic], LTD., and PHILIPPINE PRESIDENT LINES, INC., MANILA,	)	
	)	
Defendants.	)	

Plaintiff, a longshoreman, was injured while unloading a cargo of plywood which had been loaded in Japan. The defendant Japan Lines [sic], Ltd. is the charterer, and the defendant Philippine President Lines, Inc., Manila, is the owner of the vessel involved. In this negligence action the jury returned a verdict against both defendants for $955,976.11.

Both defendants' motions for directed verdict were denied and they now each move for a judgment notwithstanding the verdict.

The cargo had been defectively shored in Japan by an independent contractor who was under the supervision of a marine surveyor hired by the charterer.

The plywood was stowed against the side or skin of the vessel's No. 2 lower hold. The defective shoring was covered over by plywood and could not be seen until

the plywood was being unloaded. Plaintiff does not contend that there is evidence that the Master or ship's crew had actual knowledge of the defect in the condition of the cargo. He contends that the evidence supports a finding of constructive knowledge.

The Master and crew had no duty to supervise the details of the work of the contractors hired to shore the cargo, particularly where the work was being supervised by a surveyor hired for that purpose. There was no evidence from which the jury could find that the Master or crew should have known of the danger and thus there was no constructive knowledge. There was insufficient evidence to create a question of fact on the issue of negligence on the part of the Master or crew. *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2nd Cir. 1977).

Plaintiff relies on the testimony of two expert witnesses to the effect that the Master is responsible for the condition of the ship and the entire cargo. In my view this is insufficient to establish negligence in the circumstances of this case under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 910, *et seq.*

Plaintiff also contends that the charter party supports his claim against both defendants.

Clause 8 of the charter party provides:

> That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew and boats. The

> Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim and discharge the cargo at their expense and risk under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

This Clause is modified by Clause 42 in the typewritten provisions, which states:

> The Master to prosecute all voyages with the utmost dispatch and to render customary assistance with the vessel's crew. The Master to be under the orders of the Charterers as regards employment, agency or other arrangements. The Charterers to indemnify the Owners against all consequences or liabilities arising from the Master, Officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders. The Owners not to be responsible for shortage, mixture, marks, or for the number of pieces or packages, nor for damage to or claim on cargo caused by bad stowage or otherwise provided that the same does not arise from any lack of diligence on the part of the Master or crew. Memorandum in support of Japan Lines' [sic] Motion for Judgment N.O.V.

The charter party language is intended to allocate liability to owners of damaged cargo between the shipowner and the time charterer. It creates no liability or duty to an injured workman.

Defendant Japan Lines [sic], Ltd. moves in the alternative for an order granting a new trial on the issue of damages. Defendant Philippine President Lines moves in the alternative for an order remitting the amount of the verdict. The motions for a new trial on damages and for remittitur should be denied. Plaintiff suffered injury to the brain and has been permanently disabled from driving an auto or from working near machinery or in locations where falls pose a particular problem. The evidence is clear that his petit mal epilepsy is the result of his injury.

IT IS HEREBY ORDERED that defendants' motions for judgment n.o.v. are granted, and the judgment previously entered herein on the jury verdict is set aside and judgment shall be entered in favor of defendants and the plaintiff's complaint dismissed.

Dated this 11th day of January, 1979.

/s/ Edward Leavy
United States Magistrate

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
JAN 11 1979
ROBERT M. CHRIST, CLERK
By:_____ DEPUTY

APPENDIX C

JUDGMENT OF NINTH CIRCUIT

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the court. If the decision is by opinion, judgment was entered as of the decision date printed on the slip opinion.

APPENDIX D

ORDER ON REHEARING OF NINTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAMES TURNER, Plaintiff-Appellant and Cross-Appellee, v. JAPAN LINE, LTD., and PHILIPPINE PRESIDENT LINES, INC., MANILA, Defendants-Appellees and Cross-Appellants.	)	Nos. 79-4060, 79-4062 79-4182 ORDER

BEFORE: FLETCHER and FERGUSON, Circuit Judges, and GRANT, District Judge.

The petition of Japan Lines [sic], Ltd., for rehearing and suggestion for rehearing en banc are hereby denied and the petition for rehearing of Philippine President Lines for rehearing is hereby denied.

FILED
MAY 24 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

APPENDIX E

ORDER STAYING MANDATE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES TURNER Plaintiff-Appellant, v. JAPAN LINE, LTD., and PHILIPPINE PRESIDENT LINES, INC., MANILA, Defendants-Appellees.	CA: 79-4060 CV: 75-727 ORS OREGON (Portland)
JAMES TURNER, Plaintiff-Appellee, v. JAPAN LINE, LTD., Defendant-Appellant.	CA: 79-4062 CV: 75-727 ORS OREGON (Portland)
JAMES TURNER, Plaintiff-Appellee, v. JAPAN LINE, LTD., Defendant,	CA: 79-4182 CV: 75-727 ORS OREGON (Portland) ORDER

and)
)
PHILIPPINE PRESIDENT)
LINES, INC., Manila,)
)
Defendant-Appellant.)
)

BEFORE: FLETCHER AND FERGUSON, Circuit Judges.

Upon consideration of appellee's emergency motion for a stay of mandate, the mandate in these cases is stayed for a thirty (30) day period from the date of this order. This order is subject to reconsideration if any opposition is filed within ten (10) days.

FOR THE COURT:

Phillip B. Winberry
Clerk of Court

By: /s/ Linda J. Brooks
Linda J. Brooks
Deputy Clerk

FILED
MAY 24 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

APPENDIX F

Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C. § 905(b)]

§ 905(b). "In the event of injury to a person covered under this chapter caused by the *negligence of a vessel*, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. *If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providiny stevedoring services to the vessel.* If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. *The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.* The remedy provided in this subsection shall be exclusive of all other remedies against the vessel

except remedies available under this chapter."

APPENDIX G

United States Arbitration Act
(9 U.S.C. § 1, *et seq.*)

§ 3. "If any suit or proceeding be brought in any of the courts of the United States upon any issue referrable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referrable to arbitration under such an agreement, shall on application of one of the parties stay the trial court of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

APPENDIX H

Treaty of Friendship, Commerce, and Navigation Between the United States of America and Japan

"ARTICLE IV

"1. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without registration or similar requirements.

"2. Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such

courts, except where found contrary to public policy. When so declared, such awards shall be entitled to privileges and measures of enforcement appertaining to awards rendered locally. It is understood, however, that awards rendered outside the United States of America shall be entitled in any court in any State thereof only to the same measure of recognition as awards rendered in other States thereof."

"* * * * *.

"ARTICLE XIX

"1. Between the territories of the two Parties there shall be freedom of commerce and navigation.

"* * * * *.

"3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other Party.

"* * * * *.

"ARTICLE XXII

"1. The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

"2. The term 'most-favored-nation means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country."

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-2368

ORIENT LINES, LTD.,

Petitioner,

v.

JAMES TURNER and PHILIPPINE PRESIDENT LINES, INC., MANILA,

Respondents.

BRIEF OF RESPONDENT JAMES TURNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-2349

JAPAN LINE, LTD.,

Petitioner,

v.

JAMES TURNER and PHILIPPINE PRESIDENT LINES, INC., MANILA,

Respondents.

BRIEF OF RESPONDENT JAMES TURNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent James Turner, plaintiff below, urges the Court to deny the petition of Japan Line, Ltd. for certiorari.

QUESTIONS PRESENTED FOR REVIEW

Respondent Turner does not agree with Petitioner's statement of issues. The issues presented by the record are more accurately set forth below:

(1) Is certiorari appropriate where (a) unrebutted evidence discloses that the officers of a vessel negligently violated a longstanding safety custom and practice which resulted in injury to respondent Turner; (b) the Ninth Circuit upheld the resulting verdict and judgment after reviewing the issues of negligence in the light of Scindia Steam Navigation Co., Ltd. v. De Los Santos, --- US ---, 101 S Ct 1614, 68 L Ed2d 1 (1981) and rendering a decision consistent with Santos; and (c) there is no conflict of decision among the Circuits.

2. Does the record present any issue of "indemnity" affecting respondent Turner, when Turner obtained a judgment rendered upon a jury verdict against both defendants below.

3. In any event, is there any issue of "indemnity" which merits this Court's consideration on certiorari, when

all of the cases which have considered the issue hold that charter provisions identical to those presented by this record impose ultimate liability upon the charterer for negligence of the vessel's master in loading and discharging cargo, and there is no conflict of decision among the Circuits.

4. Will this Court grant certiorari to consider issues concerning the Federal Arbitration Act, a Japanese-American Treaty of Friendship, Commerce and Navigation, or "most favored nation treatment guaranteed under treaty to Japanese companies" (Pet. Br., p. 4), where those issues were never raised either in the District Court or Court of Appeals by opening briefs or briefs on petition for rehearing; and the decision below discloses no violation of statute or treaty.

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STATEMENT OF THE CASE

Respondent James Turner, a longshoreman employed at the Port of Longview, Washington, suffered brain damage and resulting psychomotor seizure epilepsy when a cargo of plywood, defectively shored when it was stowed aboard a vessel in Japan, collapsed beneath his feet.

Turner brought an action against Respondent Philippine President Lines, Inc. as owner of the vessel and against Petitioner Japan Line, Ltd. as time charterer. (CR 1, 76, 77).

Respondent Turner was injured on June 13, 1974, while employed in the lower hold of the vessel PRESIDENT QUEZON (CR 393, 394; Tr. 96-97, 104-105, 111, 159, 170, 172). He was standing on top of a stow consisting of stacked bundles of plywood when the bundles collapsed, carrying Turner with them. Turner's head struck a steel stanchion.

(Tr. 111-112, 170, 172).

The stow collapsed because the bundles were stacked on each other against the curvature or "sheer" of the vessel's hull, and there was no shoring underneath. (Tr. 121-122, 146-147, 152, 162-163, 167). When layers of cargo are stacked on one another against the sheer of the hull, each layer rests partly on the bundle below it and partly above a void. Under such circumstances, it is necessary for marine carpenters or longshoremen to nail together a platform consisting of dunnage, vertical shoring and horizontal shoring in the vacant space, so that upper layers of cargo will have a firm support, and will not be resting above thin air against the curvature of the hull. (Tr. 146-147, 152, 162-163, 167, 174-175, 120-121, 173).

It was undisputed that neither plaintiff nor his stevedore employer had any

reason to suspect that the plywood cargo was unstable. (Tr. 122, 163, 174). Thus, the condition of the stow presented a life threatening trap, concealed from the longshoremen required to work about it.

Two expert witnesses, sea captains called by the plaintiff, testified without rebuttal that it is the obligation and practice of the vessel's captain and mates to inspect the work of shoring cargo against the sheer of the hull. Lack of shoring, or improper shoring, may permit the cargo to shift in the hold when the vessel rolls at sea, threatening not only the cargo but the vessel and crew. (Tr. 144, 147, 153, 167). For those reasons, as well as to protect longshoremen or seamen required to work about the stow (Tr. 144, 146, 147), it is both the duty and practice of the master and mates of all vessels of every country to supervise personally the shoring of

the cargo in those areas where it is stowed against the sheer of the hull.

Captain William Brandt testified that it is both the custom and responsibility of the officer in charge of a vessel to see that shoring is put in place (Tr. 145), and he cannot rely upon others to carry out this responsibility. (Tr. 149). Either the captain or one of his mates is always on watch on the vessel (Tr. 149, 150). The captain's replacement is the "chief mate", who is also generally called the "loading mate" (Tr. 149, 150). The mate is "supposed to check to be sure that the cargo is properly loaded, especially "at the bottom of the hatch". (Tr. 151, 152). The custom and practice of the master is the same on all vessels of all countries (Tr. 143-145).

Captain Henrik Sievers testified that the duties of a master do not vary from

one ship or nationality to another, that it is improper to stow cargo against the sheer of the vessel without shoring, and that it is the responsibility of the master to see that the cargo is properly stowed and shored. (Tr. 165-168).

The chief officer of the vessel PRESIDENT QUEZON, Captain Santos Pucan, was listed as a witness in the Pretrial Order by the vessel owner (R II, p. 402), and was actually brought to the trial by the vessel owner and was present in the courthouse during the trial (Tr. 242). Nevertheless, Captain Pucan did not testify. It is a commonplace of maritime law that once plaintiff has made out a prima facie case of negligence, the failure of a shipowner to call crew members to rebut the case is "as fatal as positive evidence in support or confirmation of the charge." The New York, 175 US 187, 204-205 (1899).

There was testimony that shoring requires many hours of work so that the ship's officers had ample time to inspect the work (Tr. 175). The vessel's log noted the hour that the marine carpenters who performed the shoring work went into the hatch where injury occurred, so that the defendants could not claim ignorance of the work. (Def. Ex. 2002; Tr. 221, 258).

Furthermore, although not before the jury, there is in the clerk's record evidence that the duties of inspection described by plaintiff's witnesses were purportedly undertaken in this case. Motoi Shikano, an executive of the marine carpenter which purportedly did the shoring work, filed an affidavit that his company from time to time "at the request of Japan Line, Ltd. rendered shoring and lashing work for Japan Line's own vessels and/or chartered vessels. All works were

done under the supervision and direction of the chief officer of the vessel and/or often under the supervision of a port captain dispatched from Japan Line, Ltd." (CR 45). With respect to the PRESIDENT QUEZON, Mr. Shikano stated: "The shoring work aboard said vessel began on May 22 at 1430 and continued until the 24th at 2130. All of the work was done under the chief officer's supervision and with his approval." (CR 46). (Emphasis added).[1]

---

1. It is a matter of historical fact, and certainly subject to proof as a matter of custom and practice under Scindia Steam Navigation Co. v. Santos, --- US ---, 101 S Ct 1614, 68 L Ed2d 1 (1981) that ship's officers supervise stowage where improper stowage may damage the cargo or vessel. See, for example, the discussion of the conduct of the mate and captain described in Nichiman Company, Inc. v. M.V. Farland, 462 F2d 319, 333, (CA 2, 1972), a cargo damage case which arose before the 1972 amendments to the Longshoremen's and Harbor Workers Compensation Act. See also, Lemon v. Bank Lines, Ltd., 656 F2d 110 (CA 5, 1981).

The District Court instructed the jury solely upon traditional concepts of maritime negligence, and not, as Petitioner would have this Court believe, upon the doctrine of unseaworthiness.

The District Judge read plaintiff's allegations of negligence in failing to inspect for or require proper shoring or to warn of its absence, to the jury. The Court then instructed that a shipowner must use "reasonable care in order to avoid injury to a workman aboard the vessel in any situation in which it can reasonably be anticipated that a failure to use such care might result in such injury," (Tr. II, p. 41), and defined reasonable care and negligence in the usual manner. (Tr. II, p. 42).

The Court instructed that the vessel owner "* * * has no duty to supervise the minute details of work entrusted to a competent stevedore, so long as the

shipowner uses reasonable care." (Tr. II, p. 43).

The jury returned a verdict against both defendants, on which judgment was entered. (CR 413, 414). Both defendants filed motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. (CR 416, 448). The District Court granted judgment n.o.v. in favor of both defendants, but denied the alternative motions for new trial. (CR 530, 533, 534). The United States Court of Appeals for the Ninth Circuit ordered the judgment reinstated and held that the petitioner Japan Line "must indemnify the owner for any damages paid to plaintiff". (App-15). The defendant Philippine President Lines had filed an answer to plaintiff's second amended complaint which contained a cross-claim for indemnity against Petitioner. (CR 214, 215).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The decision below does not impose "liability without fault", and is consistent with this Court's opinion in Scindia Steam Navigation Co. v. De Los Santos, --- US ---, 101 S Ct 1614, 68 L Ed2d 1 (1981). Indeed the Ninth Circuit rendered its decision in the light of Santos.

Plaintiff's pleadings charged the defendants with negligence. Turner offered unrebutted proof that the master and mates violated safety practices and duties observed by all ship's officers. The District Court's instructions were based solely upon negligence. The case was pleaded, tried, argued and submitted to the jury on negligence principles. The defendants did not rebut plaintiff's prima facie case of negligence, but instead failed even to call to the stand the vessel's captain, who had been brought

by the shipowner to the courthouse for the trial. If anything is clear from this Court's decision in Santos, it is that plaintiff may make out a case of negligence based upon the vessel's violation of a custom and practice of the sea. On this point, the majority and all concurring judges agreed. (68 L Ed2d 1, 15, 18, 20, 21).

The case was not tried, nor the jury instructed, upon any non-delegable duty of a ship's master to supervise the work of foreign stevedores. The instructions summarized above make that clear. The Ninth Circuit deferred decision of this case until Santos was decided, and wrote its opinion in the light of Santos. While Part IIA of the Ninth Circuit's opinion (entitled "Vessel's Duty to Longshoremen") contains some obiter unnecessary to the decision, the Court need look no further than Part IIB of the decision (entitled

"Sufficiency of the Evidence"), to determine that the Ninth Circuit properly measured plaintiff's evidence against the requirements of Santos. The Ninth Circuit held:

> "As noted above, the plaintiff presented experts who testified as to the custom in the industry with respect to the master's, and hence the vessel's, responsibility. Defendants argue that this testimony was irrelevant and entitled to no weight at all, because the experts spoke in terms of the master's duty to ensure the 'seaworthiness' of the vessel, a concept supposedly irrelevant under § 905(b). This argument, however, misses the point. The experts testified not about legal conclusions ('unseaworthiness' or 'negligence') but about custom in the industry with respect to the master's duties. Furthermore, the master is responsible for the seaworthiness of the vessel; he is simply not liable without fault to injured longshoremen. * * * Since the jury was quite properly not instructed in terms of strict liability for unseaworthiness, there is no possibility that it might have confused the two related meanings of the term.
>
> The Supreme Court in Scindia observed that a 'necessary inquiry is whether the pertinent statutes, regulations or custom place or assume a continuing duty on the

> vessel.' 101 S Ct at 1626 (Emphasis added).
>
> We believe that the expert testimony offered by plaintiff was relevant, and perhaps necessary, to establish the customary scope of the master's duties.
>
> In addition to this expert testimony, plaintiff offered the testimony of longshoremen as to how the cargo should have been shored and how long the shoring should have taken; entries into the ship's log noting when the marine carpenter entered the hold; and testimony that the master or his mates were responsible for continuous supervision of the loading operations, particularly the shoring of the cargo. Plaintiff also produced evidence that the stow of the cargo was unreasonably dangerous to the offloading longshoremen, and that the defect could not[2] have been discovered by them." (App-10-12; 651 F2d 1300, 1304-1305).

The legislative history of the 1972 amendments makes it clear that Congress did not intend to bar recovery based upon negligence simply because the shipowner's negligence renders a vessel unseaworthy. See

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2. The underlined word was omitted from the lower court's opinion as set forth in the Appendix to the Petition (App-12).

Santos v. Scindia Steam Navigation Co., Ltd., 598 F2d 480, 485 (CA 9, 1979).

2. The decision below is not in conflict with decisions of other Circuits.

According to Petitioner, the decision below is in conflict with Ruffino v. Sandia Steam Navigation Co., 559 F2d 861 (CA 2, 1977), and Lemon v. Bank Lines, Ltd., 656 F2d 110 (CA 5, 1981). It is not. Ruffino involved injury to a longshoreman who "stepped on the end of a rug which overhung a space between two pallets of tea". Unlike our case, there was no evidence that the condition of the stow imperiled the vessel or that it was the practice of the captain and mates to eliminate all spaces, however small or unimportant, between pallets of cargo. Under such circumstances, the Second Circuit held that the shipowner "* * * was not required to supervise the minute details of the loading stevedore's

work", a ruling consistent with the facts of the case at bar, where shoring of the cargo was anything but a "minute detail".

Lemon, a post-Santos decision, is equally unlike our case. Lemon involved injury to a longshoreman arising out of a defective stow. The vessel offered evidence that it actually supervised the manner of stow in a foreign port, and considered the stow to be safe. The Fifth Circuit held that it was error for the District Court to grant judgment notwithstanding the verdict where "the chief mate had actual knowledge of the improper loading technique and failed to take actions to either correct the stowage or warn the plaintiff or his co-workers of the dangerous conditions contained within the stow."

Thus, there is no conflict between our case and Ruffino or Lemon. Indeed, Lemon

merely emphasizes the truth of the evidence offered by plaintiff's experts in our case, that ship's officers do in fact supervise important details of stowage in loading ports.

3. The Court below did not "depart from the accepted and usual course of proceedings" in failing to discuss a trivial issue raised on appeal by Petitioner, i.e., that the damages awarded Respondent Turner were excessive.

Petitioner argued before the District Court and Ninth Circuit that the damages awarded to respondent Turner were excessive. An appellate court is not guilty of misconduct when it publishes an opinion that ignores unimportant issues. Following this Court's lead in Affolder v. New York, Chicago & St. Louis Railroad Co., 339 US 96, 70 S Ct 509, 94 L Ed 683 (1950), the Ninth Circuit for many years has ruled repeatedly that it will not

second guess a trial court's judgment on damages unless it can affirmatively say that the damages are "monstrous" or "grossly excessive". Southern Pacific Co. v. Guthrie, 186 F2d 926, 933 (CA 9, 1951); Bradley Mining Co. v. Boice, 194 F2d 80 (CA 9, 1951); American Mail Line, Ltd. v. Weaver, 408 F2d 674, 675 (CA 9, 1969).

The judgment of $955,976.11 for Turner's brain injury and epilepsy was not "monstrous", and the Ninth Circuit cannot properly be faulted for failing to discuss an insignificant issue already well settled by decisions of the Ninth Circuit and of this Court.

4. The issue of indemnity under the charter between Respondent Philippine President Lines, Inc. and Petitioner Japan Line, Ltd. does not involve Respondent Turner, since Turner's verdict and judgment were against both defendants. In

any event, the Ninth Circuit appears to have determined correctly that Petitioner must bear ultimate responsibility for payment of the judgment. Contrary to Petitioner's assertions, there is no conflict among the Circuits on this issue.

The jury returned a verdict in favor of Turner against both defendants. (CR 413). The judgment entered on that verdict was against both defendants. (CR 414). Thus, the issues of indemnity raised in Paragraphs 3, 4, 5 and 6 of Petitioner's "Reasons for Granting the Writ" do not affect Respondent Turner in any way.

However, the decision of the lower Court placing ultimate responsibility for the judgment on Petitioner was proper. There is no conflict among the Circuits.

The New York Produce Exchange form of time charter normally contains a clause (usually Clause 8) which, as in our case,

provides:

> "The Captain, although appointed by the owners, shall be under the orders and directions of the charterer as regards employment and agency. Charterers are to load, stow, trim and discharge the cargo at their expense and risk under the supervision of the captain. * * *." (CR 394; Tr. 49, 137; Pl. Ex. 2).

Nichiman Company v. M.V. Farland, 462 F2d 391 (CA 2, 1972) and Fernandez v. Chios Shipping Co., Ltd., 542 F2d 145 (CA 2, 1976) hold that the charterer is responsible under Clause 8 for the master's negligence in loading and discharging cargo.

According to Petitioner, the Second Circuit is at odds with the Fifth and Sixth Circuits, but Petitioner is not correct. The most recent decision of the Fifth Circuit on this issue, Nitram, Inc. v. Cretan Life, 599 F2d 1359 (CA 5, 1979), puts that circuit squarely in the camp of the Second Circuit. See also,

Horn v. CIA De Navegacion Fruco, 404 F2d 422 (CA 5, 1968).[3]

Migut v. Hyman-Michaels Company, 571 F2d 352 (CA 6, 1978), upon which Petitioner also relies to find a conflict, holds only that Clause 8 does not apply to negligent acts or conditions outside the loading and discharging process.

Thus, all of those Courts which have confronted the issue would place responsibility for Respondent Turner's injury upon the charterer. The shipowner's answer to

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3. Petitioner ignores these cases and cites only D/S Ove Skou v. Hebert, 365 F2d 341 (CA 5, 1966) which had held that Clause 8 does not give the time charterer "any operational control" over loading activities but is simply "a specification of the party--owner or charterer--upon whom the ultimate financial cost rests for any one or more of the activities." (365 F2d 341 at 351). However, in view of the Court's subsequent decision in Nitram, Inc. v. Cretan Life, 599 F2d 1359 (CA 5, 1979), Hebert can no longer be considered law in the Fifth Circuit.

plaintiff's Seconded Amended Complaint contained a cross-claim demand for indemnity against Petitioner as charterer. (CR 214). The Court of Appeals had authority to determine the outcome of the indemnity issue under Rule 54(c), FRCP.

5. Neither the "Federal Arbitration Act", or the "Treaty of Friendship, Commerce, and Navigation" between the United States and Japan were raised as defenses below. Moreover, the decision of the Ninth Circuit reveals no violation of the Act or Treaty.

Petitioner claims that the decision below ignores the Federal Arbitration Act, 9 U.S.C. § 1, and the Treaty of Friendship, Commerce and Navigation signed April 2, 1953 between Japan and the United States. If Petitioner contends that either of these documents has a bearing on Respondent Turner's judgment against Petitioner, Petitioner's claims come too

late in the day. Neither the Act nor the Treaty were raised by Petitioner or anyone else in pleadings or testimony in the District Court, in briefs or oral argument in the Ninth Circuit, or in the petition for rehearing which Japan Line filed after the Ninth Circuit issued its decision. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." Youakim v. Miller, 425 US 231, 234, 96 S Ct 1399, 47 L Ed2d 701 (1976).

In any event, petitioner's claims present no significant issue justifying the grant of certiorari. Under Nichiman and other cases discussed above, Japan Line's liability under the charter was clear. Furthermore, the decision of the Ninth Circuit does not draw any invidious distinction between foreign nationals and United States nationals. The responsibility of the vessel is the same whether

it flies an American or foreign flag and whether it takes on cargo at a foreign or domestic port.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. 81-2349

JAPAN LINE, LTD., Petitioner,

v.

JAMES TURNER and PHILIPPINE PRESIDENT LINES, INC., MANILA, Respondents.

REPLY OF JAPAN LINE, LTD., TO BRIEF IN OPPOSITION OF JAMES TURNER

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October Term, 1981

No. 81-2349

JAPAN LINE, LTD., Petitioner,

v.

JAMES TURNER and PHILIPPINE PRESIDENT LINES, INC., MANILA, Respondents.

Japan Line, Ltd., replies to the brief in opposition to its petition filed on behalf of Mr. Turner.

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REPLY TO MR. TURNER'S STATEMENT OF THE CASE

Mr. Turner's statement of the case is misleading and inaccurate in numerous respects. The following three points are the most egregious.

First, there was no cross claim for indemnity at trial. The following statement from Mr. Turner's brief is misleading:

> "The defendant Philippine President Lines had filed an answer to plaintiff's second amended complaint which contained a cross-claim for indemnity against petitioner. (CR 214, 215)." (Response, p. 12.)

Phillippine President Lines dropped its claim for indemnity and reserved the right to seek indemnity after trial. The case was tried on a pretrial order which contained the following description of the procedural posture of the case:

> "STATEMENT JURISDICTION AND NATURE OF THE PROCEEDINGS
>
> "This is an action for injuries alleged to be suffered

> by Turner while employed as a longshoreman on board the vessel PRESIDENT QUEZON. The Jurisdiction is granted the Court by 28 USC §1332. Turner has demanded a trial by jury. Mitsuwa Transport Co., Ltd. has been dismissed from the case by order of the Court. *Philippine reserves and is afforded the right to cross claim for indemnity against Japan after trial of Turner's claim.*" [Emphasis added] R. 393.

The trial judge entered a judgment N.O.V. holding that the defendants owed no duty under 33 USC § 905(b) to Mr. Turner for the operations of the foreign stevedore. Therefore, there was no occasion for Philippine Line to seek indemnity under its charter party with Japan Line.

Second, Mr. Turner is unusually generous in ascribing knowledge of the alleged defect in stowage to the master and crew. (Response, pp. 6-12). In fact, the trial judge held that there was no evidence from which the jury could have found that the master or crew should have

known of the defective stowage by the Japanese stevedore (R. 530-532). The Second Circuit reached the very same conclusion for the same practical reasons. *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861, 863 (2d Cir. 1977). Same: *Edmonds v. Compagnie Generale Transatlantique*, 558 F.2d 186, 189 (4th Cir. 1977), reversed on other grounds, 443 U.S. 256 (1976). In fact, on cross examination, one of Mr. Turner's experts conceded that the inspections performed by the vessel's owners would be at most intermittent. (R. 149).

This is, however, irrelevant. Mr. Turner's third egregious error is that he argues negligence in the face of evidence that both defendants had fulfilled their duty to Mr. Turner (Response pp. 9-12). As a matter of law, under 33 USC § 905(b), neither of the

defendants is vicariously liable for the negligence of the foreign stevedore.

REPLY TO MR. TURNER'S RESPONSE ON THE ISSUE OF INDEMNITY

Mr. Turner made two fundamental errors of legal analysis in his response on the issue of indemnity. (Response, pp. 20-24).

First, there is a conflict in the circuits on this issue. The Ninth Circuit held that Japan Line must indemnify Philippine President Lines *solely* on that court's interpretation of Clause 8 of the charter party. The court adopted the reasoning of the Second Circuit in a case decided prior to the 1972 amendments to the LHWCA. *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145 (2d Cir. 1976).

Mr. Turner cites a Fifth Circuit case allocating responsibility for *cargo damage* between an owner and a charterer

under Clause 8 for the proposition that the Fifth Circuit also uses Clause 8 to allocate responsibility for *personal injury*:

> "The most recent decision of the Fifth Circuit on this issue, *Nitram, Inc. v. Cretan Life*, 599 F2d 1359 (CA 5, 1979), puts that circuit squarely in the camp of the Second Circuit." (Response, p. 22.)

Mr. Turner suggests that this 1979 *cargo* case overrules a prior personal injury case. *D/S Ove Skou v. Hebert*, 365 F.2d 341 (5th Cir. 1966) *cert. denied*, 400 U.S. 902, 91 S. Ct. 139, 27 L. Ed. 2d 139 (1970), held that Clause 8 does not allocate responsibility for personal injury. Mr. Turner states:

> "However, in view of the Court's subsequent decision in *Nitram, Inc. v Cretan Life*, 599 F2d 1359 (CA 5, 1979), *Hebert* can no longer be considered law in the Fifth Circuit." (Response, p. 23, fn. 3.)

The Fifth Circuit recently affirmed the principle of *D/S Ove Skou v. Hebert*,

supra, and noted the conflict between that case and *Fernandez v. Chios Shipping Co., Ltd., supra. Mallard v. Alum. Co. of Canada*, 1981 AMC 2151, 634 F.2d 236 (5th Cir. 1981).

In a footnote the Fifth Circuit set out the black letter conflict between that circuit and the Second Circuit:

> "* * * *D/S Ove v. Hebert*, 1966 AMC 2223, 2236, 365 F.2d 341, 351 (5 Cir. 1966), *cert. denied*, 400 U.S. 902 (1970), cited by appellees, holds that the third cited clause [Clause 8] makes a charterer responsible for the costs of cargo handling, but in and of itself does not transfer operational responsibility from the owner. (Compare *Fernandez v. Chios Shipping Co., Ltd.*, 1976 AMC 1780, 542 F.2d 145 (2 Cir. 1976) which upheld an indemnity claim by the vessel owner against the time charterer on the basis of this provision where the cause of the personal injury was directly related to loading or discharging cargo.) In light of *Skou*, this circuit seems reluctant to find any shift of operational responsibility for personal injuries to the time charterer absent clear language to that effect. * * *." 634 F.2d at 242, fn. 5.

In that same footnote, the Fifth Circuit suggests that the entire charter party be read to ascertain intent on the allocation of liability for personal injury:

> "* * * Generally, however, a time charterer, one who has no control over the vessel, assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the charter intended otherwise. * * *" 634 F.2d at 242.

The Sixth Circuit noted this conflict between the Fifth Circuit and the Second Circuit in *Migut v. Hyman-Michaels Co.*, 571 F.2d 352, 354 (6th Cir. 1978). That court further noted that the Second Circuit had adopted its interpretation of Clause 8 before the 1972 amendments to the LHWCA and that its decision on Clause 8 must be affected by those amendments:

> "Regardless of the extent to which the sharing between the owner and charterer of the captain's supervision may have

> shifted responsibility prior to enactment of the Longshoreman's and Harbor Workers Compensation Act (LHWCA) Amendments of 1972, 33 U.S.C. §§ 901 *et seq.* (1970 Supp. II), we believe the decision of this case is affected by the amendments." 571 F.2d at 355.

The court did not find that Clause 8 shifted responsibility from the owner to the charterer. 571 F.2d at 356.

Second, Mr. Turner misstates the procedural posture of the case. It is true as Mr. Turner states that:

> "The shipowner's answer to plaintiff's Seconded [*sic*] Amended Complaint contained a cross-claim demand for indemnity against Petitioner as charterer. (CR 214)." (Response, p. 24.)

However, it is not true as Mr. Turner then says that:

> "The Court of Appeals had authority to determine the outcome of the indemnity issue under Rule 54(c), FRCP." (Response, p. 24.)

The pleadings were superseded by a pretrial order and passed away from the

case. The contentions of the owner did not contain a demand for judgment against the charterer (R. 397). *See* discussion, *supra*, at pp. 2-3.

CONCLUSION

For these reasons, and those contained in Japan Line's petition, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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